Statement regarding Best Practices for Jury Selection

August 3, 2016

The Justices of the Supreme Judicial Court have endorsed the attached "Best Practices for Jury Selection." The Justices encourage trial judges and attorneys to follow and, where appropriate, participate in training in these practices.

The Best Practices were proposed by the Supreme Judicial Court's Committee on Juror Voir Dire. Chief Justice Gants convened the Committee in September 2014 to recommend how jury selection might be enhanced throughout the trial court, including how best to implement Chapter 254 of the Acts of 2014. That statute granted attorneys and self-represented parties the right to question potential jurors in all Superior Court trials, effective February 2, 2015.

The Committee was chaired by SJC Justice Barbara A. Lenk and included judges from the five trial court departments that conduct jury trials, representatives from bar associations, prosecutors, defense attorneys, and academics with expertise in jury selection.[1] The Justices expressed their appreciation to the Committee and in particular to the chairs of the Committee's Working Groups: District Court Judge Jennifer L.

[1] The Members of the Committee included: BMC Judge David J. Breen; Professor R. Michael Cassidy, Boston College Law School; John W. Cavanaugh, Office of Jury Commissioner; Superior Court Chief Justice Judith Fabricant; BMC Judge Serge Georges, Jr.; District Court Judge Jennifer L. Ginsburg; Superior Court Judges Maynard M. Kirpalani, Peter M. Lauriat, Robert Rufo, and Bertha Josephson; Assistant District Attorney Mark Lee, Massachusetts District Attorney's Association; Carolyn I. McGowan, Esq., Committee for Public Counsel Services; Juvenile Court Judge Lawrence Moniz; Douglas K. Sheff, Massachusetts Bar Association; Mark. D. Smith, Boston Bar Association; Housing Court Judge Jeffrey M. Winik, and Commissioner Pamela Wood, Office of Jury Commissioner.

Ginsburg, and Superior Court Judges Bertha Josephson (retired), Peter M. Lauriat, and Robert C. Rufo.

The Committee's Final Report to the Justices includes an overview of the Committee's findings as well as individual reports of the four working groups which looked in depth at (1) implementation of Chapter 254 in the Superior Court; (2) jury selection in the Boston Municipal, District, Housing, and Juvenile Courts; (3) the Pilot Project in which Superior Court judges volunteered to allow attorneys to employ the panel voir dire method; and (4) education and training for judges and attorneys regarding attorney participation in voir dire.

The Committee's Final Report, which was submitted on July 12, 2016, is available on the Court's website.

BEST PRACTICES FOR JURY SELECTION

Endorsed by the Justices of the Supreme Judicial Court

July 20, 2016

1. Meaningful Pretrial Communications as to Empanelment: In the Superior Court's experience, providing an opportunity for judges and the parties to discuss empanelment in depth before trial can result in an efficient and effective process. The Supreme Judicial Court's Committee on Juror Voir Dire (Committee) recognizes the difficulty of adhering to a principle of meaningful pretrial conferencing in all trial court departments, especially where judges and prosecutors are often not assigned to trial cases until the last minute.

   A judge's intended empanelment procedures should be communicated to the parties in each case. If possible, a pretrial conference should be scheduled close in time to the trial date, or in any event prior to empanelment. At that conference, the judge and the attorneys should be prepared to discuss the procedures the judge will employ, including: the details of the case description that will be provided to the venire; the extent to which the judge will give a pre-charge on significant legal principles; the nature of the judge's intended voir dire of jurors; the nature of any attorney participation in voir dire; the number of alternates to be seated; the number of peremptory challenges to be allowed; and, the order and timing of the parties' assertions of challenges for cause and peremptory challenges in relation to the seating of venire members in the jury box. Judges should encourage attorneys to attempt to reach agreement before trial, if possible, regarding the above matters.

   Judges are encouraged to set forth in writing their standard empanelment practices, particularly with respect to attorney participation in voir dire, and to provide that guidance to the parties before trial.

   In more complicated cases where attorneys anticipate requesting substantial participation in voir dire, it could be helpful if the trial judge were specially assigned, where feasible, before trial, so a conference concerning empanelment

could be held before the trial date.

2. Written Motion Practice as to Empanelment: Parties wishing to make proposals regarding empanelment procedures, including as to attorney participation in voir dire, should make such proposals by written motion *in limine* filed prior to trial. Written motions should be filed with respect to voir dire topics and legal-principle instructions which the party seeks the court to approve. Such motions should alert the judge to any areas where the parties agree. If proposed instructions to the venire are lengthy, the moving party is encouraged to provide the judge with an electronic version of its proposals. Where the parties do not reach agreement, the judge should consider motions and proposals filed by any party.

3. Clarity with respect to the Number of Peremptory Challenges: Rules of procedure govern the number of peremptory challenges to which each party is entitled. If requested by a party, a judge should consider exercising discretion to grant additional peremptory challenges in cases that are complex or that involve highly sensitive issues. A judge should always state on the record prior to empanelment the number of peremptory challenges that will be available to each party.

4. Consideration of Supplemental Juror Questionnaires in Appropriate Cases: In complex cases, cases involving highly charged or sensitive issues, and other appropriate cases, a judge may consider the use of written supplemental juror questionnaires. In appropriate cases, the judge should invite the parties to propose such questionnaires well before the trial date. Attorneys seeking approval of supplemental questionnaires should file a motion *in limine* proposing procedures for the dissemination, completion, collection, and use of the questionnaires. If possible, the moving party should provide the judge an electronic version of its proposals. A judge considering use of a supplemental questionnaire should discuss the mechanics with the court officers assigned to the jury assembly room.

5. Individual Voir Dire of Each Prospective Juror: Speaking individually to each potential juror at least once is critical to a judge's threshold inquiry into

qualifications and excuses for cause. The Committee's surveys demonstrated that most judges already conduct some individual voir dire with each potential juror – either always or often. As required by statute, inquiry about responses to Confidential Juror Questionnaires must be done on an individual basis. G. L. c. 234A, § 23. Jurors answering affirmatively to any question of the full venire have long been brought to sidebar for follow-up. Case law requires individual voir dire in certain criminal trials, depending on the race of defendants and alleged victims and the nature of the charges. From these experiences, judges and attorneys have recognized that such voir dire, even if limited in length and scope, frequently reveals important issues concerning language ability, mental health status, comprehension, or other impediments to jury service that would not have been observed without personal contact with the juror. That contact also permits jurors to raise private or embarrassing concerns that they otherwise might not disclose.

6. Allowance of Attorney Participation in Voir Dire: If one or more of the parties request attorney participation in voir dire, some form of attorney voir dire should ordinarily be allowed. Attorneys often have information about the facts and potential legal issues in a case which have not been disclosed to the judge before trial. Therefore, attorney participation may be necessary to reveal potential bias.[2] Research suggests that potential jurors may respond more candidly to questions posed by attorneys than those posed by judges, because of the vast social-status difference often felt by jurors facing judicial questioning.[3] Judges also maintain

[2] See, e.g., Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & Nicole L. Waters, Ph.D., for the National Center for State Courts and the State Justice Institute, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, April 2007, at 28 ("[A]ttorneys are generally more knowledgeable about the nuances of their cases and thus are better suited to formulate questions on those issues than judges.") (last accessed April 11, 2016: http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx)

[3] Id. ("The balance between judge-conducted and attorney-conducted voir dire is important for several reasons. Empirical research supports the contention that juror responses to attorney questions are generally more candid because jurors are less intimidated and less likely to respond to voir dire questions with socially desirable

discretion to impose reasonable restrictions on the conduct, length, and subject matters of such voir dire. A judge should ordinarily permit attorneys, subject to the judge's supervision, to question jurors directly, either individually or by a "panel" or other group method.[4] Attorney participation should include at least a reasonable and meaningful opportunity for the attorneys to ask follow-up questions concerning juror responses to written questionnaires and the judge's questions. Voir dire should be "sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges."[5]

7. Voir Dire Directed at Bias: Trial judges should recognize the importance of identifying bias – explicit and implicit - in all cases where a party, a significant

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answers.") (citing Susan E. Jones, *Judge versus Attorney-Conducted Voir Dire*, 11 L. & HUMAN BEHAV. 131 (1987)).

[4] The Committee considered whether to recommend a particular form of attorney voir dire. In particular, it considered whether to recommend the use of exclusively individual voir dire by attorneys, or the Pilot Project model of "panel" voir dire, or some other form of group voir dire. The consensus was that individual trial judges should have the benefit of the Superior Court judges' experiences, which have been wide-ranging in terms of mechanics, and that it is a best practice, in effect, to consider carefully the two forms widely used now in the Superior Court, in light of the particulars of the case to be tried, the requests of the attorneys involved, the experience level of the attorneys involved, and the time and jurors available for empanelment. The two methods most commonly used in the Superior Court since February 2015 have been, consistent with that court's Standing Order 1-15: (a) attorney-conducted individual voir dire that follows the judge's own questioning of each individual juror, and (b) panel voir dire, which involves questioning after the jury box is full of jurors seated upon the conclusion of the judge's own individual voir dire, and any attorney voir dire that has been deemed by the court necessary to conduct individually. In the latter context, the size of the "panel" questioned in group format is the size of the jury box. In jury-of-six trials (in the District Court, the BMC, and delinquency proceedings in the Juvenile Court), where venire size tends to be small (e.g., 15 to 18 jurors), some form of expanded panel voir dire might be appropriate and efficient. As the Superior Court protocol recognizes the ability of attorneys to conduct effective panel voir dire with groups of 14 to 16 jurors, it would make sense for a judge seating a jury of six to effectively and efficiently employ a similar protocol to that used in the Pilot Project, but expand the "panel" to similar size. This would require consultation with court personnel and counsel and might not be possible if juror responses made from outside the bar area cannot be properly recorded.

[5] ABA Principle for Juries and Jury Trials 11(B)(3) (2005).

witness, or an attorney may be subject to such bias. Where requested by a party, a judge should conduct or permit attorneys to conduct voir dire directed at identifying such bias. Jurors, like all members of society, may have biases – explicit or implicit - towards persons whom they identify as having characteristics or group associations that are different from their own, or about which they otherwise have prejudicial beliefs.[6] While such bias may be difficult to uncover, judges and attorneys can and should make efforts to do so in all cases where an identifiable bias will potentially impact juror reactions to a significant participant or issue in the trial. Of special note is that while individual voir dire has long been required by case law in a discrete subset of particularly serious "interracial" criminal cases, bias may impact the fairness of *any* trial in which potential bias is implicated.

8. Meaningful Instructions to the Venire: Jurors should be provided instructions by the judge that promote fair and effective voir dire and contribute to the judge's and the attorneys' efforts to identify potential bias. The judge should explain the role and purpose of voir dire, emphasizing the importance of candor and honesty. Jurors should be advised of the purpose of the Confidential Juror Questionnaire,

[6] This topic, for example with respect to implicit racial bias, has been the subject of extensive research and analysis. See, e.g., Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 Duke L.J. 345 (2007) (judges and jurors); Jerry Kang et. al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124 (2012); Justin D. Levinson et. al., Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test, 8 Ohio St. J. Crim. L. 187 (2010) (study confirmed hypothesis that study participants held strong associations between "black" and "guilty," relative to "white" and "guilty," and implicit associations predicted the way mock jurors evaluated ambiguous evidence); Samuel R. Sommers, Race and the Decision-Making of Juries, 12 Legal & Criminological Psychol. 171, 177-78 (2007) (archival and observational studies using behavioral measures generally find that race does influence jury decision-making); Tara Mitchell, et al., Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment, 29 Law and Hum. Behav. 621, 627-28 (2005) (meta-analysis of thirty-four mock jury studies involving over 7,000 participants revealed a statistically significant association between defendants' race and verdicts, with mock jurors less likely to vote to convict a same-race defendant than a defendant of a different race); Jennifer L. Eberhardt et al., Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, 17 Psychol. Sci. 383 (2006).

how it will be used, and who will have access to the information. Further, the judge should consider giving a "pre-charge" at the beginning of empanelment that provides venire members a meaningful description of the case and, where requested, brief instruction on the most significant claims, charges or legal principles to the extent such instruction is necessary for relevant voir dire. The judge should consult with the attorneys as to a neutral way to frame these issues. The parties should assist in this process by proposing pre-charge language prior to trial.

9. Allowance of Time for Meaningful Participation in Jury Selection: All empanelment participants should have sufficient time to reflect with care on juror responses to voir dire. The process should be neither unnecessarily lengthy nor unreasonably expedited. Attention to juror dignity and respect requires that jurors have a meaningful opportunity to reflect before responding to voir dire, including the judge's questions of the full venire. Before questioning the venire, the judge should encourage jurors to take time to think carefully about the questions and their responses, and questions should be posed slowly enough for jurors to have time to do so.

   Attorneys should be given sufficient time to reflect with care on the juror responses to voir dire. The judge should ensure that parties receive the Confidential Juror Questionnaires and any supplemental questionnaires in time to permit adequate review of the materials before empanelment. Following voir dire, the judge should allow sufficient time for attorneys to have meaningful communications with their clients and co-counsel regarding the information obtained during the process, including potential for-cause issues that may have arisen and the potential exercise of peremptory challenges.

10. Consideration of Alternatives to Individual Voir Dire at Sidebar: When practicable, the judge should conduct individual voir dire of the prospective jurors at a location comfortable for the jurors and conducive to candor and

confidentiality, such as with each juror and all participants sitting at counsel table, or with the juror on the witness stand. In making this determination, the judge may consider, among other factors, the nature of the case, the anticipated length of individual voir dire, any physical impediments to the parties or attorneys standing at length at sidebar, security issues, and the configuration of the courtroom and the courthouse.

Adapted from the Supreme Judicial Court's Committee on Juror Voir Dire
Final Report to the Justices

Submitted July 12, 2016